No. 87-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COLONY SQUARE COMPANY,
a Georgia Limited Partnership,
Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

ROBERT E. HICKS
CHARLES E. CAMPBELL
HICKS, MALOOF & CAMPBELL
A Professional Corporation
101 Marietta Tower
Suite 3401
Atlanta, Georgia 30335
(404) 586-1100

JOHN S. KINGDON
(Counsel of Record)
ROBERT J. BROOKHISER
WILLIAM E. WALLACE III
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800
Attorneys for Respondent The Prudential Insurance Company of America

March 4, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

In this long (twelve years), litigious (original and appellate proceedings before nine different state and federal courts) and acrimonious (multiple disqualification motions by petitioner) bankruptcy case, petitioner seeks a remand for *de novo* proceedings before a different bankruptcy judge due to the manner in which three orders of the court were prepared. These orders were prepared by counsel for respondent, at the request of the bankruptcy court, after the court decided to rule in respondent's favor. Although petitioner's counsel were not expressly notified that these three orders were prepared in this fashion, they knew that other orders in the case had been prepared in the same manner and that the bankruptcy judge had previously used this procedure with petitioner's counsel in another case. The principal orders subject to collateral challenge by petitioner here have each been affirmed by the district court and/or the court of appeals, with knowledge of petitioner's claim that they were prepared improperly.

The question presented is:

Whether, in light of the circumstances of this case and the detailed factual findings of the district court, all of which are fully supported by substantial evidence in the record, the court of appeals erred in affirming the decision of the district court which declined to vacate three orders of the bankruptcy court and to disqualify the bankruptcy judge and respondent's counsel.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, Colony Square Company, a Georgia Limited Partnership, and the respondent, The Prudential Insurance Company of America.*

---

* Pursuant to Rule 28.1 of this Court, a listing of the subsidiaries and affiliates of The Prudential Insurance Company of America is provided in the Appendix hereto.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1299

COLONY SQUARE COMPANY,
a Georgia Limited Partnership,
Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

The Prudential Insurance Company of America ("Prudential") files this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner, Colony Square Company ("Colony").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 819 F.2d 272 and is reproduced in Appendix A to the Petition (App. A-A1-11).[1]

---

[1] In this brief, the Appendix to the Petition is referred to as "App.", the Petition as "Pet.," the Record on appeal as "R," and exhibits introduced by petitioner and respondent below as "CS" and "PR", respectively.

The opinion of the United States District Court for the Northern District of Georgia is reported at 60 Bankr. 1003 (1986) and is reproduced in Appendix B to the Petition (App. B-A12-58).

COUNTERSTATEMENT OF THE CASE

The underlying dispute between the parties concerns Colony's failure to honor the obligations it voluntarily assumed as part of the confirmed plan of arrangement entered in bankruptcy proceedings Colony initiated in 1975 under Chapter XII of the (subsequently repealed) Bankruptcy Act of 1898. In 1982, when Prudential sought to enforce its rights under that plan, Colony embarked on a series of procedural maneuvers and collateral litigation in nine different federal and state courts, including repeated attempts to disqualify the judge presiding in the bankruptcy court after he made several rulings in Prudential's favor.

The issue before the lower courts was whether this protracted case should be remanded for additional proceedings before a different judge because three orders of the bankruptcy court were prepared by counsel for Prudential at the request of the bankruptcy court, apparently without petitioner's advance knowledge. Based on the extensive evidentiary record developed during proceedings before the district court, both the district court and the court of appeals found that the relief requested was not required in light of the specific facts and circumstances of this case.[2] In the case of each order, the bankruptcy judge held hearings and received extensive briefs from the parties and had already reached a definite decision (App. A-A8-9, A11; App. B-A18-19,

[2] These facts and circumstances are set forth at length in the detailed opinion of the district court and summarized in the opinion of the court of appeals. The petition largely disregards these factual findings, substituting petitioner's version of events in their place. As a result, the counterstatement is somewhat more detailed than would otherwise be required.

A23, A24, A45) before requesting that the order be prepared. In each instance, the judge provided specific instructions as to the contents of the order. (App. A-A9, A11; App. B-A18-19, A23, A24, A45.) Each of the principal orders has been independently reviewed and affirmed by the district court and, in the case of the main order at issue, by the court of appeals. (App. A-A10; App. B-A17, A23, A24, A46.)

A. Colony's Original Bankruptcy Petition and Its Failure to Meet Its Obligations Under the Agreed Plan of Arrangement

In October 1975, Colony filed its voluntary Chapter XII bankruptcy petition and, in March 1977, an agreed plan of arrangement was confirmed in that case by order of the federal bankruptcy court in Atlanta. Under the plan, Colony retained title to the Colony Square Complex but Prudential leased and managed it. Because the plan remained to be carried out, no final decree was issued, and the bankruptcy court retained exclusive jurisdiction over the plan, the property and the parties. (App. B-A15.)

For over four years, Colony met its financial obligations under the plan. In October, 1981, however, Colony failed to make its required payment; it also failed either to discharge its debt to Prudential or to bring the debt current as required by the plan. As a result, on January 8, 1982, Prudential notified Colony that it was exercising its option under the agreed upon plan to purchase the property in exchange for cancellation of Colony's debt. January 29, 1982 was set as the date for the tender of the requisite documents. (App. B-A15.)

B. Colony's Unsuccessful Efforts to Avoid Its Obligations Under the Plan

1. *Colony's Second Bankruptcy Case*

One day before the tender was to take place, Colony filed a voluntary Chapter 11 case in the federal bank-

ruptcy court in Pittsburgh. Relying on the automatic stay provision of the new Bankruptcy Code, Colony contended that the filing of its new bankruptcy case superseded its obligations in the pending proceedings before the Atlanta bankruptcy court. The federal district court in Pittsburgh rejected this argument and, in November, 1983, transferred Colony's second bankruptcy case to the Atlanta district court which, in turn, referred it to the Atlanta bankruptcy court.[3] (App. B-A15-16.)

2. *Prudential's Motion to Compel Compliance With the Plan*

On February 9, 1984, Prudential filed a motion with the Atlanta bankruptcy court to compel Colony's compliance with the plan and to transfer title to Prudential, as expressly provided by the plan. In response, Colony filed a "counterclaim" asserting that Prudential had mismanaged the property, barring Prudential's remedies under the plan.[4] After briefing and argument at a series of hearings, the Atlanta bankruptcy court held on May 14, 1984 that, under the express terms of the plan, Colony's "counterclaim" did not bar Prudential's right to take title to the property. The court then severed the mismanagement claim for separate trial. This order, which is not challenged here, was appealed and affirmed by both the district court and the Court of Appeals. *In re Colony Square Company*, 779 F.2d 653 (1986),

---

[3] Because Colony's second case involved the same property that was subject to the pending proceeding, the Atlanta bankruptcy court dismissed the second case for lack of subject matter jurisdiction on March 26, 1984. (App. B-A16.) This order, which is not challenged here, was appealed and affirmed by the district court and the Court of Appeals. *In re Colony Square Company*, 788 F.2d 739 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 95 (1986). (App. B-A16.)

[4] Until Prudential notified Colony that it would exercise its option to take title to the property, Colony never once complained of mismanagement by Prudential, although it had a right to do so under the plan.

cert. denied, 107 S. Ct. 95 (1986). The court also scheduled a final hearing on Prudential's motion to compel compliance. (App. B-A16-17.)

3. *Colony's Third Bankruptcy Case*

In the meantime, shortly after the dismissal of Colony's second bankruptcy case, unsecured creditors affiliated with certain of Colony's limited partners filed an "involuntary" bankruptcy petition against Colony in the Pittsburgh bankruptcy court. Two days before the final hearing on Prudential's motion to compel compliance with the original plan, Colony voluntarily converted the newly filed "involuntary" bankruptcy case to a Chapter 11 case under the Bankruptcy Code. (App. B-A16.)

4. *The Title Order*

The last of many hearings on Prudential's motion to enforce compliance with the plan took place on Friday, June 22, 1984. Prior to the hearing, both parties filed extensive briefs. (App. B-A18.) The hearing itself lasted two and one-half hours. (App. A-A2.) As the district court found, the bankruptcy judge participated actively and displayed full awareness of the issues. (App. B-A49; PR-130.) Colony had every opportunity to present its reasons why title should not be transferred. Colony's sole defenses were to (i) repeat its previously rejected contention that its mismanagement "counterclaim" prevented the transfer of title to Prudential, and (ii) contend that Colony's recently converted third bankruptcy case stayed all further proceedings before the Atlanta bankruptcy court. (App. B-A16-17; PR-130.) Relying on its prior decisions to dismiss Colony's second bankruptcy case and to sever the mismanagement claim, the court rejected these arguments from the bench, whereupon Colony moved to recuse the court for bias. (App. B-A17, n.2.) Colony also threatened to bring an immediate contempt action in Pittsburgh, if Prudential proceeded with the hearing. (PR-130 at 4.)

After the June 22, 1984 hearing, the Atlanta bankruptcy judge called Prudential's counsel at his office and informed counsel that he had decided to rule in Prudential's favor. In light of the imminent "sunset" of bankruptcy courts, *see Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), *judgment stayed*, 459 U.S. 813 (1982), the judge asked counsel for Prudential to prepare an order granting Prudential's motion, specifying the points to be included. (App. B-A18-19, A47; R3-(57-59); PR-190.) A draft order was prepared and delivered to the judge's chambers later that day.[5] (App. B-A19.) The bankruptcy court reviewed the draft order prepared by counsel and, after making several typographical corrections, entered the order on June 25, 1984.[6] (App. B-A20; R4-249, 255; PR-134.) Counsel for Colony was not expressly notified that the bankruptcy court had requested Prudential's counsel to

---

[5] At that time, counsel for Prudential requested a hearing (set for the following Monday) to consider a motion to enjoin Colony from further collateral attacks on the jurisdiction of the bankruptcy court, including the threatened contempt proceedings in the Pittsburgh bankruptcy court. (App. B-A19.) These are the "other" *ex parte* contacts referred to in the petition. (Pet. 2 n.2.)

[6] The same day, the Pittsburgh bankruptcy court considered Colony's motion to enjoin Prudential from taking any action against the Colony Square property. (App. B-A20.) Petitioner relies on the fact that during the course of that hearing, but before the Atlanta bankruptcy judge had signed the title order, counsel for Prudential stated that "we don't know how [the Atlanta bankruptcy court] is going to rule." (Pet. at 5.) The district court found that this statement was misleading. (App. B-A54.) However, contrary to petitioner's contention that this statement was material to the proceeding (Pet. at 5, n.18), the district court found that Colony had not shown that it was harmed as a result. (App. B-A48, A54.) Two days after the hearing, the Pittsburgh bankruptcy judge denied Colony's motion for a temporary restraining order out of a sense of comity for the Atlanta bankruptcy court. (App. B-A21, A48.) Previously, the federal district court in Pittsburgh had held that Colony's "second" bankruptcy petition did not divest the Atlanta bankruptcy court of jurisdiction over the property. (App. B-21.)

prepare the order transferring title. (App. B-A18, A20.) However, contrary to petitioner's contention that the bankruptcy court was engaged in a collusive, unethical attempt to cover up the manner in which the order was prepared, *see* Pet. at (i), 3, 5, 7, 18, the district court found that there was no intent on the part of the bankruptcy court to keep this information from Colony's counsel. (App. B-A57.) Instead, the bankruptcy court assumed "that counsel for the prevailing party will communicate with a Colony Square attorney regarding any draft which was prepared. . . ." (App. B-A57.)

The title order is the centerpiece of petitioner's repeated efforts to disqualify the bankruptcy judge. This order involved only legal issues, not disputed facts. (App. B-A46.) Significantly, the title order has been appealed and affirmed as legally correct by both the district court and the Court of Appeals,[7] *see In re Colony Square Co.*, 779 F.2d 653 (11th Cir.), *cert. denied*, 107 S. Ct. 95 (1986), as was each of the other "two critical orders" of the bankruptcy court which are not subject to collateral attack (App. B-A50, n.4), but which had already effectively disposed of Colony's only two grounds for resisting the relief granted in the title order. *See* p. 4, *supra*.

C. Colony's Motions to Disqualify the Bankruptcy Judge

1. *Colony's First Set of Written Motions*

On August 31, 1984, eight weeks after the title order, Colony filed identical motions before the bankruptcy court and the district court to disqualify the bankruptcy judge

---

[7] Colony repeatedly informed the Court of Appeals of its claim that the title order should be vacated due to the manner of its preparation: it sought a stay of the appeal (App. B-A17), it raised the issue during oral argument on the merits, and it filed the briefs and transcripts of the disqualification hearings before the district court. Colony also notified this Court of its collateral challenge to the title order in seeking a writ of certiorari to review that order. *See* Petition in S. Ct. Dkt. 85-2041, at 9-10 n.5 and Appendix to Petition therein at 120a-163a.

for bias as manifested in his rulings.[8] (App. B-A55.) Colony did not raise the issue of counsel's preparation of orders even though it knew that the bankruptcy court had requested Prudential's counsel to prepare several orders.[9] After receiving briefs, the bankruptcy court held a hearing on Colony's disqualification motion on September 17, 1984. (App. B-A23; PR-147.) As the district court found, the bankruptcy judge "was an active participant in the proceedings and was intimately familiar with the issues." (App. B-A45.) Four weeks later, after reaching his decision to deny the motion, the bankruptcy court telephoned counsel for Prudential, instructing him to prepare an order to that effect and describing the specific points to be addressed. (App. B-A23; R3-(131-136); R4-(207-218); PR-198.) A detailed order was drafted and submitted to the court, which reviewed and then entered the order several days later. (App. B-A23; PR-151.) As in the case of the title order, counsel for Colony was not informed of the manner in which this order was prepared. (App. B-A23.) The district court found, however, that there was no intent by the bankruptcy court to hide this fact from petitioner's counsel.[10] (App. B-A57.) Col-

---

[8] At the June 22, 1984 title hearing, counsel for Colony made two oral motions demanding that the bankruptcy judge recuse himself for bias. The bankruptcy judge initially denied these motions from the bench but, on June 25, 1984, withdrew his denial and permitted Colony to file a written motion. (App. B-A17, n.2, A22.)

[9] After the title order was entered, the parties filed a series of motions that were argued on August 27 and 28, 1984. On August 29, the bankruptcy court informed counsel for Prudential that it had ruled in Prudential's favor on three of the motions, requesting that counsel for Prudential prepare appropriate orders. Counsel for Prudential notified opposing counsel of the court's decision later that day. (App. B-A21-22, A25, A55-56; PR-192; R3-(113-115).)

[10] Colony refers to allegedly false statements by counsel for Prudential in connection with the disqualification order as evidence of a collusive cover-up. Petitioner particularly stresses counsel's

ony appealed the denial of its disqualification order to the district court. Having already denied Colony's companion motion to disqualify the bankruptcy judge, the district court affirmed the bankruptcy court's order. (App. B-A23.) Colony did not appeal.

2. *Colony's Second Set of Written Motions*

Colony's original disqualification motions were not finally resolved until March, 1985. Although it knew that counsel for Prudential had prepared several orders of the court, Colony never raised this issue in support of its claims of bias. Nor had it made any effort to investigate whether other orders, including the title order, had been prepared in this fashion, even though counsel for Colony (i) immediately congratulated Prudential's counsel on his "handiwork" in connection with the title order (App. B-A26); (ii) repeatedly described the title order as "so bad it could have been written by [Prudential's counsel]" (App. B-A26, A28-29); (iii) acknowledged that "it was the general impression among our co-counsel [in Atlanta] that most if not all of Judge Robinson's opinions in the Colony Square proceedings were in fact authored by lawyers [for Prudential]" (App. B-A30); and (iv) had themselves been asked by the same bankruptcy judge to prepare orders in another case (App. B-A28).

It was only after reading about the disqualification of a judge in another case and after the district court affirmed the title order and the order severing Colony's mismanagement claims on April 2, 1985, that counsel for Colony actively sought to confirm that other orders of the bankruptcy judge, particularly the title order, had been prepared by counsel for Prudential. (App. B-A40-41.)

---

denial, in an affidavit, of improper *ex parte* contacts with the bankruptcy court. (Pet. at 6, 7.) The district court "carefully considered" these statements in detail and concluded, on the basis of all of the record evidence, that, under the circumstances in which they were made, counsel did not intend to mislead either opposing counsel or the court. (App. B-A53-54.)

Finally, on May 20, 1985, counsel for Colony asked counsel for Prudential whether he had prepared the title order. Prudential's counsel responded that he had done so and that, at the request of the bankruptcy court, he had prepared several other orders, which he then identified. (App. B-A41.)

On June 6, 1985, Colony filed motions with the bankruptcy court, the district court and the court of appeals seeking to disqualify both the bankruptcy judge and counsel for Prudential and to vacate the title order and six other orders that had been prepared, at the request of the bankruptcy judge, by counsel for Prudential.[11] The district court directed that extensive discovery take place, including discovery from the bankruptcy judge himself. (App. A-A3-4.) In addition, a four-day evidentiary hearing was held and both sides filed extensive prehearing and post-hearing briefs. (App. B-A13.)

D. The Opinions Below

1. *The Opinion of the District Court*

On May 9, 1986, the district court denied Colony's motion in a 51-page opinion which, as described by the court of appeals, "made detailed findings concerning the facts surrounding the issuing of the bankruptcy judge's orders and their discovery by Colony's lawyers." (App. A-A4.) The district court ruled that Colony had not been

---

[11] The motions filed with the bankruptcy court and the court of appeals were withdrawn or dismissed. Although counsel for Colony first averred that they were unaware that any of these orders had been prepared by counsel for Prudential, Colony's counsel had actual knowledge of the preparation of four of these orders. (App. B-A25.) In addition to the title order and the disqualification order, the only order of which Colony's counsel was not aware was an order denying reconsideration of an award of fees in connection with an earlier order awarding discovery sanctions. The circumstances surrounding the preparation of this order—which the petition notes is not "crucial" (Pet. at 3)—are set out in the opinion of the district court. (App. B-A24, A45; R-4 (218-220).)

denied due process, noting that it had been given notice of pending issues and an adequate opportunity to present its arguments prior to the bankruptcy court's decision and, further, that the judge had reached firm decisions prior to his request that counsel for Prudential prepare orders reflecting those decisions (App. B-A45.) The district court also emphasized that each of the principal orders had been independently affirmed on appeal, that it believed the orders were correct as a matter of law when it had originally reviewed them and that, after examining them again, it "continued to hold this belief." (App. B-A46, A49-51.) The district court rejected, as contrary to the evidence, Colony's various contentions (identical to those raised in the petition) that it had, in fact, been prejudiced by the method of preparation of the orders. (App. B-A47-49.) Finally, the district court determined that, in light of the facts of the case, the challenged orders need not be vacated and neither the bankruptcy judge nor Prudential's counsel disqualified. (App. B-A51-57.) Colony appealed.

2. ***The Opinion of the Court of Appeals***

On June 12, 1987, the court of appeals affirmed the decision of the district court, finding that "the record in this case does not warrant overturning the lower court's judgment." (App. A-A2.) The court of appeals "strongly disapprove[d]" the method of preparing the three orders in question, stating that the "bankruptcy judge's actions in preparing these orders have little to commend them." (App. A-A2, A11.) However, "having reviewed the record in this case," the court of appeals concluded that "Colony was not denied due process." (App. A-A8, A11.)

In reaching this conclusion, it stressed that the bankruptcy judge "was found to have already reached a firm decision before asking [counsel for Prudential] to draft the proposed orders." (App. A-A8, A11.) There was substantial evidence in the record to support this finding of fact and "no evidence to indicate that this finding was clearly erroneous." (App. A-A8 n.16.) The court of

appeals also noted that the bankruptcy court's "decisions followed a number of hearings on those issues where the judge played an active and ongoing role." (App. A-A9.) "Rather than being swayed by the proposed orders, the bankruptcy court directed that draft orders be prepared which reached a particular result and discussed specific points." (App. A-A9.) On the basis of this evidence, the court of appeals concluded that the bankruptcy judge "did not abdicate his adjudicative role." (App. A-A9.)

The court of appeals also stressed that Colony "had ample opportunity to present its arguments" and that the challenged orders "were reviewed and affirmed by the district court." (App. A-A10, A11.) In addition, the title order—which is the focus of Colony's attack here—was independently reviewed and affirmed by the court of appeals "as correct as a matter of law." (App. A-A10.) As a result, Colony was not denied a meaningful opportunity to be heard.

Finally, the court of appeals did not believe that the bankruptcy court was obligated to recuse itself *sua sponte* pursuant to 28 U.S.C. § 455(a). The court of appeals rejected this contention, as had the district court, noting that § 455(a) had not been applied to the type of circumstances presented in this case. (App. A-A8 n.14; App. B-A56-57.)

Colony sought rehearing *en banc* on essentially the same grounds contained in its petition here. Rehearing was denied on November 6, 1987, with no judge on the full court requesting a vote on rehearing *en banc*. (App. D-A61-62.)

REASONS FOR DENYING CERTIORARI

The petition should be denied because the decision of the court of appeals below is correct, does not conflict with the holdings of this court or any other court of appeals, and does not present an important question for resolution by this Court.

I. THE PETITION DOES NOT PRESENT ANY ISSUE OF GENERAL PUBLIC IMPORTANCE

A. The Decision Below Is Limited to the Procedural And Factual Circumstances of This Case

The decision of the court of appeals involves the application of accepted legal principles to the unique procedural facts and circumstances of the case. *See* Parts IC and II, *infra*. In concluding that the manner in which three orders had been prepared did not require that they be vacated or the bankruptcy judge disqualified, the court of appeals based its decision on its review of the extensive factual record in the case. (App. A-A2, A8, A11.) In particular, the court stressed the fact that: (i) the bankruptcy court had reached a firm decision before asking counsel to prepare draft orders (App. A-A8); (ii) the bankruptcy court had reviewed the extensive briefs of the parties on the issues involved and had actively participated in lengthy hearings, demonstrating that he had not abdicated his judicial role (App. A-A9); (iii) the principal orders in question had been independently reviewed and affirmed on appeal as a matter of law (App. A-A10); and (iv) petitioner failed to demonstrate any prejudice as a result of the manner of preparation of the orders (App. A-A11).

The specific factual circumstances of this case were central to the court of appeals' decision.[12] They are highly unusual and unlikely to recur, as the district court recognized when it referred to the "extraordinary circumstances presented by this litigation". (App. B-A52.)

---

[12] Each of these factual findings was made on the basis of the district court's careful and detailed examination of the extensive evidence in the record. While petitioner disputes or ignores many of them, each was affirmed by the court of appeals. Because the Court does not sit "to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984), review of those factual determinations is unwarranted.

Accordingly, the decision below does not present issues of general public importance beyond the interests of the parties below. It is therefore not appropriate for this Court's certiorari review. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

B. The Decision Below Does Not Condone, Much Less Encourage, Judicial Misconduct

Reduced to its essence, petitioner's principal argument for review is that the decision of the court of appeals condones and thereby encourages judicial misconduct,[13] threatening the integrity of the judicial system. (Pet. at 2, 9, 28.) Any fair reading of the decision below belies this contention. While the court of appeals determined that the challenged orders need not be vacated nor the bankruptcy judge disqualified, it did not reach this conclusion because it approved of the method in which the orders were prepared. To the contrary, the court of appeals "strongly disapprove[d] of the bankruptcy judge's methods" in having counsel prepare orders without taking steps to assure notice to the other side. (App. A-A2, A11.) So did the district court. (App. B-A57.) Both courts recognized the possible problems associated with this practice and unequivocally endorsed decisions of this

---

[13] The petition also seeks review of the decision below for failing to disqualify counsel (but not the bankruptcy judge) on grounds that the court of appeals so far departed from accepted judicial practice as to call for supervisory action by the Court. (Pet. at 26-27.) While the district court found that counsel had acted improperly (App. A-A52), it also concluded that, in view of "the extraordinary circumstances presented by this litigation," petitioner did not satisfy the two-part test for disqualification set forth in *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1210 (11th Cir. 1985). (App. A-A52-55.) The petition does not even refer to this test, much less suggest that it is improper, or that it was misapplied. There was no departure from accepted judicial practice with regard to disqualification of counsel.

Court and other courts of appeals which criticize it. (App. A-A4-7; App. B-A41-43.) Under the circumstances, it can hardly be said that the decision below condones, much less encourages, the practice which it so harshly criticizes. Significantly, petitioner cites no instance in which another court has interpreted either of the decisions below as endorsing the preparation of orders by counsel.[14]

C. This Case Presents No Genuine Issue With Regard to the Judicial Disqualification Statute and Adds Nothing to The Liljeberg Case

Petitioner implicitly recognizes that the narrow, fact-bound holding of the court below does not justify independent review by this Court when it suggests, as its first reason for granting certiorari, that this case, together with *Liljeberg v. Health Services Acquisition Corp.*, S. Ct. Dkt. No. 86-957 (argued December 9, 1987) "provides an ideal opportunity for the Court to set out clear guidelines for the federal courts to follow in applying 28 U.S.C. § 455" to instances of alleged judicial misconduct. (Pet. at 9, 28.) Even if the Court might one day be inclined to accept an invitation to legislate a comprehensive set of "guidelines" for the federal courts to follow in applying 28 U.S.C. § 455(a), it is difficult to see how this case, either alone or together with *Liljeberg*, provides an appropriate opportunity to do so.[15]

---

[14] Petitioner cites one editorial which criticizes the decision below (as well as the decision in another case). (Pet. at 15, n.45.) The same editorial acknowledges the possibility that "reasonable minds could differ in the propriety of ghostwriting. . . ." *See* Nat'l L.J. Aug. 17, 1987. Evidently, neither the United States of America, which appeared as *amicus* before the district court, nor the judges of the full court of appeals, which denied rehearing *en banc*, feel that the decision below has the dire consequences predicted by petitioner.

[15] The decision below does not contain an extended analysis of § 455(a). Reflecting the fact that the issues petitioner presented to the courts below were couched principally in terms of an alleged violation of petitioner's due process rights, the court of appeals'

In their posture before the Court, the two cases are entirely dissimilar. *Liljeberg* involves an express conflict in the courts of appeal on the pivotal question of whether disqualification under § 455(a) was retroactive or prospective. *Compare United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) with *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d (5th Cir. 1986), *cert. granted* 107 S. Ct. 1368 (1987). That issue is not even mentioned in the decision below. Accordingly, this case can add nothing to the Court's consideration of the issues raised in *Liljeberg*. Not surprisingly, neither the parties nor the *amici* in *Liljeberg* cite either of the decisions below in any of their briefs before this Court.

The courts below did not address the retroactivity of disqualification under § 455(a) because they concluded that § 455(a) did not apply to the conduct at issue in this case.[16] In *Liljeberg*, by contrast, the lower court found—and the petitioner in that case conceded before

---

discussion of § 455(a) is contained in one footnote. Evidently recognizing that this is not the detailed treatment of issues the Court might expect before developing "guidelines" of the sort suggested in the petition, petitioner tries to piggy-back review of this case on *Liljeberg*.

[16] The courts below stressed that the alleged appearance of impropriety or partiality in this case stemmed from the manner in which court orders were prepared, not from some "extra-judicial" source (App. B-A56-57) such as "financial or personal conflicts of interests" (App. A-A8) of the sort generally thought to be covered by the statute. *See, e.g., Hamm v. Members of Board of Regents of State of Florida*, 708 F.2d 647, 651 (11th Cir. 1983). Although petitioner contends that the court below clearly erred in this regard (Pet. at 12-17), it cites only one district court decision for the proposition that "ghostwritten" opinions require disqualification of the judge under § 455(a) in every case. *In re Wisconsin Steel Corp.*, 48 B.R. 753 (N.D. Ill. 1985). However, the same district court has not construed § 455(a) so broadly in a subsequent case. *See, e.g., In Re Cenco, Inc., Securities Litigation*, 642 F. Supp. 539, 542-43 (N.D. Ill. 1986).

this Court (*see* Petition in S. Ct. Dkt. 86-957 at n.6)—that there was an appearance of partiality of the sort covered in § 455(a). It is therefore not the case, as petitioner contends (Pet. at 11), that the Court's disposition of *Liljeberg* controls, or even affects, the result in this case. In this regard, it should also be noted that the district court below denied petitioner's motion to disqualify pursuant to § 455(a) on the alternate ground that the motion was not timely. (App. B-A55.)

Petitioner also contends that the court below committed "a crucial error" when it failed to quote the text of § 455(a) and then characterized petitioner's claim as one of the "appearance of impropriety" rather than that the court's "impartiality might be reasonably questioned." (Pet. at 13, n.4) This is nothing but a quibble: the court of appeals twice cites the pertinent statutory provision and petitioner itself argued to the court below that "the goal of the judicial disqualification statute is to foster the *appearance* of impartiality." (Brief of Appellant at 28, emphasis in original.) Significantly, petitioner does not seriously suggest that this alleged "error" affected the decision below.

II. THE DECISION BELOW WAS CORRECT AND DOES NOT CONFLICT WITH THE DUE PROCESS DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS

The court of appeals carefully considered and rejected the due process arguments raised here by petitioner. The decision below was correct and fully in accordance with applicable Supreme Court and other precedent, which establishes that orders or other judicial acts are not *per se* invalid or a violation of due process simply because they are prepared by one side or involved *ex parte* contacts. *See, e.g., Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985) (findings adopted verbatim from litigants given deference when "court itself pro-

vided framework for the proposed order"); *United States v. Adams*, 785 F.2d 917, 920-21 (11th Cir.), *cert. denied*, 107 S. Ct. 650 (1986) (*ex parte* conference between judge and government party not unconstitutional); *Odeco, Inc. v. Avondale Shipyards, Inc.*, 663 F.2d 650, 652-53 (5th Cir. 1981) (finding adopted verbatim given deference where record shows that judge fully comprehended issues and adequately performed "decision making process"); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960 (5th Cir. 1975) (different standard of review not mandated by court's adoption of findings and conclusions without notice to opposing party). Instead, orders will be vacated on due process grounds only if they were reached by a process that is fundamentally unfair. *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). *See generally*, *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813 (1986).

Applying these accepted standards to the facts in this case, the court below correctly concluded that, in light of all the circumstances, the process by which the three orders were prepared was not fundamentally unfair. In reaching this conclusion, the court of appeals stressed that petitioner had an extensive opportunity to brief and argue the issues, the bankruptcy judge had made a firm decision prior to requesting the preparation of a draft order, and the orders were independently reviewed and affirmed on appeal. *See* pp. 11-12 *supra*.

Petitioner contends that the decision below conflicts with the decisions of this Court and other courts of appeal insofar as it held that petitioner's due process rights were not violated. (Pet. at 17-26.) With one possible exception (*see* p. 19, *infra*), however, petitioner fails to identify any specific decision of this Court or any other court of appeals that it contends is in direct conflict with the decision below. This is not surprising since, as the Court has noted, "[m]ost matters relating

to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948).

Instead, petitioner struggles to create "conflicts" by citing general language from a wide variety of decisions and ignoring the factual and procedural differences between the present case and the cases it cites (none of which involves mandatory disqualification of judges and vacating orders prepared by counsel at the request of the court under the circumstances present here).[17] *E.g.*, *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813 (1986) (due process violated where the court had personal stake in outcome); *In re Murchison*, 349 U.S. 133 (1955) (due process violated where court combined roles of judge and grand jury); *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965) (disqualification where court expressly retained counsel for one party to act as court's own counsel in connection with mandamus petition). Indeed, the court of appeals cites with favor many of the decisions on which the petition relies. *See, e.g., Aetna v. Lavoie, supra; Home Box Office, Inc. v. FCC*, 527 F.2d 9 (D.C. Cir. 1977); *Keystone Plastics, Inc. v. C&P Plastics, Inc., supra; In re Wisconsin Steel, supra; Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719 (4th Cir.), *cert. denied*, 386 U.S. 825 (1961). These are not the sort of genuine, irreconcilable "conflicts" of law that might support review by this Court. *See, e.g., Layne & Bowler v. Western Well Works, supra.*

In the one possible "conflict" cited by petitioner, *Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir.), *cert. denied*, 386 U.S. 825

---

[17] The two administrative cases cited in the petition are inapposite. *Camero v. United States*, 375 F.2d 777 (Ct. Cl. 1967), and *Home Box Office, Inc. v. FCC*, 527 F.2d 9 (D.C. Cir. 1977). In both cases, the decision maker had not made its decision prior to the *ex parte* contacts but instead relied on those contacts in order to reach a decision. That is the precise opposite of what occurred in this case.

(1961), the court of appeals appears to have found a due process violation simply because findings of fact and conclusions of law were prepared without notice to the other side. Nevertheless, the court directed that the case be dismissed on remand because the record conclusively showed that the decision below was justified. *Id.* at 725. That is essentially what happened here, as the orders collaterally attacked by petitioner have each been independently reviewed on appeal and upheld as legally correct. Moreover, even if the 27-year-old decision in *Chicopee* accurately reflects the current views of the Court of Appeals for the Fourth Circuit (*but see, Anderson v. City of Bessemer, supra, reversing* 717 F.2d 149 (4th Cir.) which relied on *Chicopee*), it is hardly the sort of live "conflict" which the Court ought to decide. To the contrary, the court of appeals below cited *Chicopee* with approval (App. A-A4), when it unequivocally condemned the practice challenged by petitioner.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

ROBERT E. HICKS
CHARLES E. CAMPBELL
HICKS, MALOOF & CAMPBELL
A Professional Corporation
101 Marietta Tower
Suite 3401
Atlanta, Georgia 30335
(404) 586-1100

JOHN S. KINGDON
(Counsel of Record)
ROBERT J. BROOKHISER
WILLIAM E. WALLACE III
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

Attorneys for Respondent
The Prudential Insurance
Company of America

March 4, 1988

APPENDIX

APPENDIX

In accordance with Rule 28.1 of this Court, the Prudential Insurance Company of America states that it has no parent corporation and no subsidiaries or affiliates which have outstanding any equity securities that are publicly traded. Set forth below is a list of corporations in which Prudential has or has the right to acquire more than 10% of a class of equity security that is publicly traded. These investments were acquired in the normal course of Prudential's investment operations and not for the purpose of acquiring control of these corporations.

Air Express International Corp.
BRNF Liquidating Trust
Communications Transmission, Inc.
C.P. National Corporation
Crutcher Resources
DMI Furniture
Foodmaker, Inc.
Global Natural Resources
Grubb & Ellis
Intermet Corporation
Judicate
Manufactured Homes
Maxus Energy
Miller Shoe Industries
Scan Optics
Specialty Equipment Companies, Inc.
Tom Brown
UGI
Vicom
Vista Chemical Co.
Wellman
West Texas Utilities
Prudential Special Equity Fund
United States High Yield Fund